

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LANCE McDERMOTT,

Plaintiff(s),

v.

UNITED STATES POSTAL SERVICE,

Defendant(s).

NO. C06-1335P

ORDER ON MOTIONS TO:

1. DISMISS (FRCP 12(b))
2. AMEND (FRCP 15(a))

Plaintiff filed an "Appeal for the Review of a Final Agency Action" seeking a judicial determination of whether Defendant United States Postal Service ("USPS") has violated their administrative regulations relating to nepotism, sexual harassment, promotion procedures and improper gifts at the Seattle office where Plaintiff is employed.

Defendants seek dismissal of Plaintiff's complaint. Defendant claims that Mr. McDermott has no standing (having alleged no personal injury or threat of injury) and that there is no subject matter jurisdiction. Plaintiff seeks to amend his complaint to add allegations of discrimination based on (a) his receipt of a "Grinch" award from his co-workers and (b) his failure to receive a promotion.

After review of all pleadings, exhibits and declarations, the Court rules as follows:

IT IS HEREBY ORDERED that Defendant's motion to dismiss is GRANTED, and Plaintiff's complaint is DISMISSED for failure to state a claim upon which relief can be granted (pursuant to FRCP 12(b)(6)) and also for lack of subject matter jurisdiction (FRCP 12(b)(1)).

IT IS FURTHER ORDERED that Plaintiff's motion to amend his complaint is DENIED.

## BACKGROUND

In June 2006, Plaintiff sent a letter to Defendant USPS outlining multiple instances of behavior and actions within U.S. Postal Service in Seattle. He alleged violations of agency regulations. The agency responded by letter in August 2006 and, point by point, refuted Plaintiff's claims.

In September 2006, Plaintiff filed this complaint (Dkt. No. 1). Plaintiff made no claim of any injury or threat of damage to himself as the result of the actions he alleges in his complaint or June 2006 letter. In January 2007, Plaintiff filed a "Motion to Amend Pleading" asking to include allegations that his receipt of a "Grinch" award from his co-workers and his failure to receive a promotion constitute discrimination against himself. These new allegations are currently the subject of an ongoing EEOC investigation.

## ANALYSIS

### Failure to state a claim: Lack of standing

A plaintiff filing a federal lawsuit must allege an actual or threatened injury from some improper action in order for a federal court to assume jurisdiction over the case. Owen v. Mulligan, 640 F.2d 1130, 1132 (9<sup>th</sup> Cir. 1981); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973). Standing is "an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defendantenders of Wildlife, 504 U.S. 555, 560 (1992). The burden is on Plaintiff to demonstrate an injury that is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Id. (internal citations omitted).

Nothing in Plaintiff's original complaint demonstrates anything other than the most generalized harm to himself from the claimed activity. He does note (in a later-filed "Brief – Appeal for the Review" (Dkt. No. 5), not the Complaint) that "Petitioner has been aggrieved by false statements written by Postal Service Officials that may have violated Title 18 Section 1018 Official Writings."

1 Id., p. 4. But he never elaborates on the nature of the false statements or the nature of his injury.  
2 Furthermore, his Title 18 allegations cite to federal criminal statutes, for which there is no  
3 corresponding civil remedy.

4 Plaintiff's response to the argument that he has failed to allege any injury to himself is  
5 inconsistent. At one point he notes that "[a]ll the grievances I filed were on behalf of other  
6 employees." Plaintiff's Reply, p. 3. Elsewhere he claims that "[t]he documented exhibits clearly show  
7 that other employees and I have been wronged, aggrieved and adversely affected" (Id. at p. 5), but  
8 again he cites to no evidence of specific injury to himself. Plaintiff filed his Motion to Amend in an  
9 attempt to remedy his lack of standing, but (as discussed below) that motion is denied. Plaintiff has  
10 failed to state a claim upon which relief can be granted.

11 Lack of subject matter jurisdiction

12 Plaintiff alleges a variety of violations under the Postal Reorganization Act ("PRA"), 39 U.S.C.  
13 §§ 101, *et seq.* The language of the PRA operates to exclude from the broad grant of federal subject  
14 matter jurisdiction the grievance claims of U.S. Postal Service workers, limiting them instead to the  
15 remedies under their Collective Bargaining Agreement ("CBA"). The PRA authorizes the Postal  
16 Service to create internal policies and procedures – up to and including binding arbitration – to settle  
17 administrative disputes (39 U.S.C. § 1206(b)) and grants the National Labor Relations Board  
18 ("NLRB") the authority to supervise the bargaining units within the Postal Service. 39 U.S.C. §§  
19 1202-1203.

20 There are some instances in which suits against the Postal Service are authorized – e.g.,  
21 actions brought by the NLRB, actions alleging contract violations between the unions and the Postal  
22 Service and actions by the unions on behalf of their members. 39 U.S.C. § 1208(a).<sup>1</sup> Outside of any  
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24 <sup>1</sup> Plaintiff points out that the USPS may also be sued under the Privacy and Freedom of Information Acts,  
25 and for unlawful discrimination.

1 statutory exceptions (none of which are cited by Plaintiff), the PRA restricts postal workers to the  
 2 CBA grievance procedures. 39 U.S.C. §§ 1206 and 1209. Plaintiff's claims do not arise under any of  
 3 the exceptions – the statute he cites in his complaint as conferring jurisdiction (3 U.S.C. §  
 4 401(a)(4)(A)) concerns the “Extension of Certain Rights and Protections to Presidential Offices” and  
 5 has nothing to do with Postal Service employees.

6 Plaintiff also attempts to establish jurisdiction by citing to a provision in Pub. L. 91-375  
 7 (containing the PRA) which states

8 [a]ll orders, determinations, rules, regulations, permits, contracts, certificates,  
 9 licenses and privileges (1) which have been issued. . . by. . . (i) any court of  
 10 competent jurisdiction and (2) which are in effect at the time the United  
 11 States Postal Service commences operations, shall continue in effect until modified.  
 . . by the Postal Service. . . by any court of competent jurisdiction, or by  
 operation of law.

12 Plaintiff appears to believe that the phrase “any court of competent jurisdiction” somehow confers  
 13 subject matter jurisdiction over the PRA to this court. It does not.

14 Plaintiff cites no case law in support of his position that subject matter jurisdiction exists over  
 15 his claims. In fact, the case law is to the contrary. Unless otherwise mandated by statute, Postal  
 16 Service actions are not reviewable as violations of federal law. Harper v. Frank, 985 F.2d 285, 289  
 17 (6<sup>th</sup> Cir. 1993); Pitney Bowes, Inc. v. U.S. Postal Service, 27 F.Supp.2d 15, 20 (D.C.Cir. 1998).

18 One of those exceptions are “adverse actions” (Pub.L. 95-454, 92 Stat. 1111 *et seq.*, codified as  
 19 amended in scattered sections of 5 U.S.C and incorporated into the PRA in 39 U.S.C. § 410), which  
 20 are defined as “removal, suspension, reduction in pay or grade or furlough,” none of which Plaintiff  
 21 has alleged.

22 Since the PRA contains no express grant of a private right of action, the Court must look to  
 23 the four-part test enunciated in Cort v. Ash, 422, U.S. 66, 78 (1975) to determine if such a right can  
 24 be implied. The test requires the examining court to answer four questions:

- 25 1. Does the statute create a federal right on behalf of the plaintiff?

2. Is there any indication of a legislative intent to create or deny a remedy?

3. Is it consistent with the legislative purpose to imply a remedy for plaintiff?

4. Is the implied cause of action one traditionally relegated to state law?

See Currier v. Potter, 379 F.3d 716, 726 (9<sup>th</sup> Cir. 2004); Stupy v. U.S. Postal Service, 951 F.2d 1079, 1081 (9<sup>th</sup> Cir. 1991). As the Stupy court points out, “legislative intent” is the dispositive issue, since it is unnecessary to examine the other elements if the legislature did not intend to create a private right of action. Id. That same court held that there is no private right of action. Id. at 1082. Plaintiff has cited to no legislative history or other indication of intent to create a private cause of action.

Plaintiff cites to a variety of non-PRA statutes and regulations to argue that “Federal Employee Law” applies to this case. His citations to provisions of Title 5, §§ 2301 and 2302 of the U.S.C.A. (Complaint, “Discussion” ¶¶ 1, 4 and 5) do not apply to the U.S.P.S.; his citations to Title 18 of the U.S.C.A. (Id., ¶¶ 11, 13) are to criminal statutes which do apply to the U.S.P.S. but provide no civil remedy.

The remainder of Plaintiff’s citations *appear* to be to the Code of Federal Regulations (“CFR”) and concern allegations that the U.S.P.S. did not adhere to its own regulations. Plaintiff contends that his request for the Court to review the C.F.R. allegations does not concern “employment relations” (i.e., wages, hours and conditions of employment). Claims that regulations forbidding nepotism, additional payment for job-related activities, etc. were not followed are employment issues. Such allegations are covered under the PRA and Plaintiff must seek his remedies through the CBA or other administrative recourse. This includes his complaints regarding non-union personnel. Labor-management relations are exactly the circumstances which CBA’s are intended to regulate. Although some aspects of internal Postal Service policy are specifically designated as “non-grievable” – see the “employee suggestion rewards program” which was the subject of Kroll v. United States and U.S.

1 Postal Service, 832 F.Supp. 199 (E.D.Mich. 1993) – it does not remove them from the CBA and  
2 permit Plaintiff to seek judicial review. Id., at 203.

3 Plaintiff has failed to demonstrate any exemptions permitting judicial review of the internal  
4 actions of the Postal Service, or that a private cause of action exists. This court has no subject matter  
5 jurisdiction and Defendant is entitled to dismissal pursuant to FRCP 12(b)(1).

6 Motion to amend

7 FRCP 15(a) provides that leave to amend “shall be freely given when justice so requires,” but  
8 the liberality is not unlimited; the Court has discretion to deny such a request where amendment would  
9 cause undue prejudice to the Defendant or is either futile or sought in bad faith. DCD Programs, Ltd.  
10 v. Leighton, 833 F.2d 183, 186 (9<sup>th</sup> Cir. 1987).

11 Plaintiff seeks to add allegations that a “Grinch” award he received from his co-workers and  
12 his denial of a promotion were “discriminatory in nature.” Mtn to Amend, p. 1. His proposed  
13 amendments are completely unrelated to anything in his initial complaint, and a review of the  
14 documents suggests that his EEOC complaint regarding this alleged discrimination is still under  
15 investigation.

16 The Court denies Plaintiff’s request to amend his complaint. His “amended” claims have  
17 nothing to do with his allegations in the original complaint and are still under administrative  
18 investigation, and the Court finds them futile.

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22 **CONCLUSION**

1 Plaintiff lacks standing to file this complaint and the Court lacks subject matter jurisdiction to  
2 hear his claims, and therefore his complaint will be dismissed. Plaintiff's motion to amend his  
3 complaint is futile. The request will be denied.

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5 The clerk is directed to provide copies of this order to all counsel of record.

6 Dated: March \_12\_, 2007

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9 Marsha J. Pechman  
U.S. District Judge